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Study on the rights of indigenous peoples and truth commissions and other truth-seeking mechanisms on the American continent

Note by the Secretariat

Pursuant to a decision taken at its eleventh session (see E/2012/43, paragraph 113), the Permanent Forum on Indigenous Issues appointed Edward John, Mirna Cunningham and Álvaro Pop, members of the Forum, to conduct a study on the links between the rights of indigenous peoples, truth commissions and other truth-seeking mechanisms on the American continent, to be submitted to the Forum at its twelfth session.

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Study on the rights of indigenous peoples and truth commissions and other truth-seeking mechanisms on the American continent[1]

I. Truth commissions and the rights of indigenous peoples

A. Establishing truth commissions

1. Victims of serious violations of human rights or international humanitarian law as well as their families have the right to an effective remedy. The right to know the truth,[2] to the fullest extent possible, is one element of an effective remedy[3] that is increasingly being recognized by various United Nations resolutions,[4] expert reports[5] and national, regional and international courts.[6]

2. Truth commissions are official, non-judicial investigative bodies established with a predetermined temporal mandate to investigate historical periods of violence that have been suppressed or denied; to recognize the dignity of victims; and to propose policies to ensure that violations are not repeated.[3] The recommendations of truth commissions are generally aimed at identifying the causes of violations, determining patterns of abuse, and preventing a repetition of similar acts.[6,7]

3. Truth commissions are complementary to criminal justice. They do not determine a person's criminal liability, but may provide evidence for judicial proceedings. The analysis conducted by a truth commission also helps in understanding the strategy and logic behind the crimes committed and in establishing political and moral responsibilities.[8]

4. Truth commissions focus on serious human rights violations. They have traditionally concentrated on rights protecting physical and mental integrity, as in cases of torture, enforced disappearance, murder and rape. Recently, however, some commissions have been investigating economic crimes and violations of economic, social and cultural rights.[8]

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[1] The members of the Forum thank the International Center for Transitional Justice for its valuable contributions to this report.

[2] The right to know the truth includes the goal of establishing the identity of perpetrators; the causes, circumstances and facts surrounding the violations; and determining the whereabouts of victims in cases of enforced disappearance.

[3] Varney and Gonzalez, eds., Truth Seeking: A Handbook on Creating an Effective Truth Commission, Brasilia: Brazilian Amnesty Commission, Ministry of Justice; New York: International Center for Transitional Justice (2013).

[4] See Human Rights Council resolution 9/11.

[5] E/CN.4/2006/91.

[6] Office of the United Nations High Commissioner for Human Rights, Rule-of-law tools for post-conflict States: Truth commissions (HR/PUB/06/1), available at: http://www.ohchr.org/Documents/Publications/RuleoflawTruthCommissionssp.pdf [accessed in November 2012]. See Velásquez-Rodríguez, Inter-American Court of Human Rights (Series C), No. 4 (1988); Myrna Mack Chang, Inter-American Court of Human Rights (Series C), No. 101 (2003); Bámaca-Velásquez, Inter-American Court of Human Rights (Series C), No. 91 (2002); Barrios Altos, Inter-American Court of Human Rights (Series C), No. 75 (2001), http://www.ohchr.org/Documents/Publications/RuleoflawTruthCommissionssp.pdf [accessed in November 2012].

[7] E/CN.4/2005/102.

[8] Varney and Gonzalez, eds., Truth Seeking: A Handbook on Creating an Effective Truth Commission.

5. Truth commissions generally cover extended historical periods, which allows them to identify patterns of violence or systemic violations. This approach requires the collection of a significant amount of information through archives, testimonies and other sources.[8]

6. Truth commissions adopt a victim-centric approach, as their aim is to protect the victim's dignity, and the victim's testimony is largely their primary source of evidence.[9]

7. The legitimacy of truth commissions is essential to ensure a successful outcome. Mechanisms for consultation and direct participation may strengthen dialogue and trust in the commission. In ideal situations, a commission's mandate should be elaborated through consultations, including discussions with groups representing victims, civil society and other sectors. Consultation also helps to ensure that the victims' needs are better reflected in the mandate, methodology and reports of the truth commission.[8]

B. Other truth-seeking mechanisms

1. Preservation and use of archives

8. This mechanism comprises the collection of documents and information from different sources, including testimonies from witnesses, victims and perpetrators, official documents kept by individuals, non-governmental organizations and universities, court and truth commission documents; and audio and video recordings.[10]

9. Good use and archiving of documents are a vital aspect of human rights advocacy and are conducive to effective justice and the building of more democratic societies.[10]

10. These tasks pose technical and ethical challenges, since they require high standards of transparency, objectivity and professionalism in the objectives and operations being pursued.[10]

2. Search for missing persons

11. Forensic anthropological investigations include the collection of information on missing persons, field studies, exhumations, interpretation of data in order to identify human remains, and return of remains to family members and communities for inhumation, in accordance with appropriate cultural and/or religious customs. This mechanism is vital in post-conflict societies and in situations of repression, since it could help to establish identities, determine the cause of death and the whereabouts of the remains of missing persons, clarify the circumstances and facts surrounding extrajudicial executions; provide evidence for possible criminal

[9] Ibid. It should be noted that a victim-centric approach does not necessarily mean that the work of truth commissions is based solely on victims' testimonies, since family members, perpetrators and other witnesses may also be called upon to testify.

[10] See International Center for Transitional Justice. Louis Bickford, Patricia Karam, Hassan Mneimneh and Patrick Pierce, *Documenting Truth* (2009), available at http://ictj.org/publication/documenting-truth.

investigations, and issue death certificates to families of victims whose remains are discovered.

12. There are various international guidelines and recommendations applicable to this mechanism,[11] which establish that exhumation should be conducted in accordance with systematic techniques,[12] and that families of victims and their legal representatives are entitled to receive information, participate in hearings and present evidence.[13] Various DNA,[14] autopsy and identification and funeral rights[15] protocols also point clearly to the need for psychological assistance for victims' families.

C. Rights of indigenous peoples

13. The International Labour Organization (ILO) adopted the Convention concerning Indigenous and Tribal Peoples in Independent Countries (Convention No. 169)[16] in 1989. The Convention recognizes that Governments shall have the responsibility for ensuring that indigenous peoples participate in truth commissions, in order to protect their rights and ensure respect for their dignity.[17]

14. The State has a duty to consult indigenous peoples whenever consideration is being given to measures which may affect them directly and to establish means by which they can freely participate.[18] The consultations must be undertaken in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.[19]

15. Convention No. 169 establishes that, in applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws,[20] and that measures shall be taken to ensure that members of these peoples can understand and be understood in legal proceedings, where necessary through the provision of interpretation or by other effective means.[21]

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[11] See the United Nations "Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions", which was recommended by the Committee on Crime Prevention and Control and contains minimum procedures for investigating extra-legal executions. These principles were developed at the tenth session of the Committee on Crime Prevention and Control held in Vienna in 1988, and approved by the Economic and Social Council in its resolution 1989/65. See also the conference entitled "The Missing: Action to resolve the problem of people unaccounted for as a result of armed conflict or internal violence and to assist their families", held in Geneva in 2003, and the report of the International Committee of the Red Cross containing a summary of its conclusions.

[12] "Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions", art. 12.

[13] Ibid., art. 16.

[14] "The Missing: Action to resolve the problem of people unaccounted for as a result of armed conflict or internal violence and to assist their families", para. 6.17.

[15] Ibid., para. 8.2.

[16] See International Labour Organization Convention No. 169 — Convention concerning Indigenous and Tribal Peoples in Independent Countries, art. 1.1.

[17] Ibid., art. 2.

[18] Ibid., art. 6.

[19] Ibid., art. 6 (2).

[20] Ibid., art. 8.1.

[21] Ibid., art. 12.

16. The United Nations General Assembly adopted the United Nations Declaration on the Rights of Indigenous Peoples[22] in 2007. Indigenous peoples have the right to maintain and strengthen their distinct legal, political, social, economic and cultural institutions, and to participate in the institutions of the State in which they live,[23] as well as the collective right to live in freedom, peace and security and shall not be subjected to any act of genocide or violence, forcible removal of children, forced assimilation or destruction of their culture.[24] The State has the obligation to provide mechanisms for prevention of, and redress for any action which deprives them of their integrity as distinct peoples, or of their cultural values or ethnic identities; or of dispossessing them of their lands, territories or resources.[25]

D. Rethinking the establishment of truth commissions and other truth-seeking mechanisms to protect the rights of indigenous peoples

17. Indigenous peoples are among those most affected by contemporary conflict and their suffering under such circumstances has not been addressed adequately.

18. Truth commissions have a potentially important role to play to help redress the abuses suffered by indigenous peoples and strengthen their rights, but to do so, the various characteristics of the traditional model of truth commissions must be reviewed to ensure that it is adapted to the needs and perspectives of indigenous peoples.

19. There are differences between situations of conflict to which truth commissions have typically applied and the experience of indigenous peoples, which have consequences on truth-seeking. Indigenous peoples have suffered not only violations that have affected the lives and personal dignity of their members, but also violations of their collective rights that have affected their communal way of life and their identity.[26]

20. Truth commissions have typically been established as instruments to reaffirm goals of reconciliation and unity within a nation-State. This model may not be the most inadequate to set the goals of a truth commission dealing with indigenous peoples, many of who consider themselves members of "first nations"[27] and should be recognized as such.

21. Truth commissions have usually focused on instances of recent violence; cases that can be remembered by witnesses providing first-person accounts. Indigenous peoples have suffered historical violence, the history of which is often transmitted through an oral tradition, and as such may find the existing methods of truth commissions insufficient.

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[22] General Assembly resolution 61/295, annex.

[23] Ibid., art. 5.

[24] Ibid., arts. 7 and 8.

[25] Ibid., art. 8.

[26] International Center for Transitional Justice, *Strengthening Indigenous Rights through Truth Commissions: A Practitioner's Resource* (2012), available at http://ictj.org/publication/strengthening-indigenous-rights-through-truth-commissions-practitioners-resource.

[27] The term "first nations" is widely understood in the context of the indigenous peoples of Canada. However, other self-identification terms by indigenous peoples around the world also allude often to specific national identities that are different from the State in which they live.

22. Thus, truth-seeking instruments involving indigenous issues should go beyond a form of analysis focusing on individual violations, or on the State or on recent violations, and should consider other sources beyond archival and written documents.

23. Truth-seeking mechanisms that address these design challenges in a creative manner have the potential to develop useful tools for redressing historical abuse and violations of the collective rights of indigenous peoples, including the loss of identity, culture, language, traditional indigenous institutions, community and family ties.

II. Truth commissions on the American continent

24. It is important to take a brief look at the experience of truth commissions that have tackled issues concerning the indigenous peoples of America, in order to identify lessons, challenges and opportunities for future instruments.

A. Guatemala: Commission for Historical Clarification (1997-1999)

Background

25. From the 1950s to the 1970s, the Government of Guatemala engaged in serious forms of repression against its own citizens in the context of a prolonged internal armed conflict. In particular, in the early 1980s, the Guatemalan army conducted campaigns against the opposition forces of the Unidad Revolucionaria Nacional Guatemalteca, with grave consequences for the Mayan populations in the interior of the country, including hundreds of massacres and the destruction of population centres. It was not until the mid-1990s, following negotiations between the Government and the Unidad Revolucionaria Nacional Guatemalteca, with the help of the United Nations, that the Commission for Historical Clarification was established as part of a peace agreement.[28]

Mandate

26. The Commission was created to look into human rights violations related to the internal conflict that ran between 1960 and 1996, to foster tolerance and to preserve the memory of the victims.

27. According to the Accord of Oslo, the Commission's mandate was to "... look into ... human rights violations and acts of violence ... that caused suffering among the Guatemalan people". The Commission's investigation focused on arbitrary executions, enforced disappearances, rape and forms of systemic violence. Although indigenous peoples were not mentioned in the mandate, the Commission investigated crimes committed against indigenous victims and addressed them separately in its final report. The Commission did not consult with indigenous or non-indigenous populations, but maintained a dialogue and sought the participation of victims' organizations throughout the process.

[28] See United States Institute of Peace, Truth Commission Digital Collection, Truth Commission: Guatemala, available at http://www.usip.org/publications/truth-commission-guatemala.

Work method

28. The Commission consisted of Mr. Christian Tomuschat,[29] Ms. Otilia Lux de Coti, of Mayan descent, and Mr. Edgard Alfredo Balsells Tojo, a lawyer.

29. For the purpose of its inquiry, the Commission received thousands of testimonies, conducted numerous exhumations in clandestine cemeteries, and analysed documents received from civil society and victims, many of them of indigenous descent. The Commission did not have the power to subpoena witnesses.

30. Using United Nations reports and other fieldwork, the Commission went into areas with a large indigenous population where many collective rights violations had occurred. It used advertisements, programming and an active search in villages to assemble as many victims as possible. It also used local indigenous people and translators to facilitate the dialogue with indigenous victims, especially women. It employed open questions and took note of as much information as possible, allowing witnesses to tell their stories while respecting the circularity and flow of their testimonies.

Final report

31. The Commission found that State agents had committed acts of genocide against the Mayan people[30] in the four regions most affected by violence. The military's perception of the Mayans as real or potential allies of the armed opposition, coupled with its deep racism, created the conditions that led to the extermination of entire indigenous communities. The Commission conducted 7,200 interviews with 11,000 people and generated a comprehensive database. Statistical estimates show that the death toll most likely reached 200,000. According to the Commission, 83 per cent of the victims were of Mayan descent, while the remaining 17 per cent were of mixed descent or Ladinos.[31] Many cases of abuse were identified, including aggression against elements of deep symbolic significance for indigenous peoples, such as the destruction of cornfields and extrajudicial executions of elders, custodians of traditional knowledge. The Mayans were obliged to conceal their identity, language and traditional dress, and their cycle of festivals and ceremonies was disrupted. These events had a serious negative impact on certain elements of their identity, perturbing the transmission of their culture from generation to generation and degrading their culture by using Mayan names and symbols in a military context.[32]

32. The Commission recommended reparation for the victims, activities to commemorate and restore Mayan sites, and financial assistance for exhumations. It also recommended structural reform of the military police to enable indigenous peoples' participation through measures such as bilingualism, elimination of discrimination, multicultural education and respect for traditional forms of conflict resolution.[33] It also recognized the need for indigenous people to participate in civic life and for the regional administration to recognize their right to ethnic identity,[34]

[29] Law professor at Humboldt University, appointed Chair by the Secretary-General of the United Nations.

[30] See final report, para. 122, available at http://shr.aaas.org/guatemala/ceh/report/english/toc.html.

[31] Ibid., para. 15.

[32] Ibid., para. 62.

[33] Ibid., para. 75.

[34] Ibid., para. 79.

guarantee the protection of the individual and collective rights of indigenous peoples, respect cultural plurality and promote intercultural relations. The Commission proposed that a special body should be created to monitor implementation of its recommendations, and requested the Secretary-General to lend his support, through the United Nations Verification Mission in Guatemala.

Follow-up

33. Despite much controversy and attitudinal changes among the different Governments that followed the conflict, acts of genocide committed against Mayan peoples have been admitted, including in cases brought before the Inter-American Court of Human Rights.[35] A national day of remembrance for the victims has been established, and slow progress has been made over criminal prosecutions, with exemplary sentences meted out in some landmark cases. In terms of reparations, the National Reparations Commission was established in 2005.

Other truth-seeking mechanisms used

34. Thousands of archives from the United States Government[36] containing information about the structure and organizational chart of the Guatemalan Armed Forces during the conflict were declassified.[37]

35. The Commission incorporated information from different non-governmental organizations[38] to estimate the total number of deceased or missing persons and to confirm patterns of human rights violations.[36]

Search for missing persons

36. The Commission recommended an active policy of exhumations, as a result of which approximately 700 bodies were exhumed.[39] The exhumations were carried out at the request of the victims' families.

B. Chile: Historical Truth and New Deal Commission (2000-2004)

Context

37. The Historical Truth and New Deal Commission was created in 2001 to prepare a report on the historical relationship between indigenous peoples and the Chilean State, and to make recommendations for new, more inclusive governmental policies.

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[35] Case of the Plan de Sánchez Massacre v. Guatemala, Reparations, art. 63 (1) of the American Convention on Human Rights, Judgment of 19 November 2004, Inter-American Court of Human Rights, Series C, No. 116 (2004).

[36] With assistance from the non-governmental organization National Security Archive.

[37] Priscilla B. Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity*, New York, NY: Routledge, 2010.

[38] Recovery of Historical Memory Project of the Catholic Church's Human Rights Office; and the project of the International Center for Human Rights Research, which collected thousands of testimonies through large organizations of indigenous communities.

[39] Susana Navarro García, "Exhumation processes in fourteen countries in Latin America", *Journal for Social Action in Counseling and Psychology*, vol. 2, No. 2 (2010).

Mandate

38. The Commission's purpose was to advise the Chilean President on the indigenous peoples' perspectives on historical events in Chile and to make recommendations for the establishment of a new relationship between the indigenous peoples and the rest of Chilean society.[40]

Work method

39. The Commission was chaired by the former President of the Republic, Patricio Aylwin, and was composed of 25 commissioners from various backgrounds. The Commission met in plenary session and in working groups on thematic areas and ethnic groups, and consulted with indigenous experts.[41]

Report

40. The Commission found that the indigenous peoples of Chile were descendants of the first occupants of the current Chilean territory. It determined that the Chilean nation was established in an attempt to assimilate native peoples by various means, including violence, and to deny them their identity and existence, with disastrous consequences for indigenous peoples (land reduction, social fragmentation, loss of assets, loss of enjoyment of their own regulatory systems, loss of their languages and the death and disappearance of entire populations). Indigenous peoples also experienced the consequences of the modernization process after the Second World War (wage-based employment, urbanization and expansion of education and political citizenship), which allowed some integration, but also resulted in the uprooting of indigenous peoples.

41. The Commission recommended seizing a historic opportunity for understanding between the State, society and indigenous peoples; recognizing the cultural diversity of Chile and the historical and cultural identity of indigenous peoples as original peoples; enacting a statute that broadly recognizes indigenous rights; ensuring constitutional recognition of the rights of indigenous peoples to live and develop in accordance with their identity and cultural system; and creating the conditions under which such rights could be exercised. The Commission also recommended constitutional recognition of the collective rights of indigenous peoples regarding consultation and participation, lands, natural resources, education, culture, customs and their own law. The most notable proposals included the need to repair the harm inflicted on indigenous peoples (environment, culture, land); to improve the domestic legal system in order to establish a solid foundation for indigenous peoples, the State and the national community; and to set up efficient and effective mechanisms for the full realization of these objectives. In order to ensure the participation and consultation of indigenous peoples, the Commission also recommended the establishment of an indigenous peoples' council, an institute for research and promotion of indigenous peoples, and a general indigenous fund to finance indigenous policies. It also made specific recommendations for each indigenous population, taking into account its unique characteristics.

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[40] Supreme Decree No. 19, 18 January 2001, available at http://biblioteca.serindigena.org/libros_digitales/cvhynt/v_i/intro/3_decreto_comision.pdf.

[41] Ibid., art. 2.

Follow-up

42. The Commission was the initial step in the legal and discursive recognition of indigenous peoples' rights in Chile; it was later followed by the announcement of "new areas for indigenous policy", including political and social participation, recognition of indigenous rights, urban indigenous policy, indigenous women and education and culture. In 2008, the Government launched its policy entitled "Re-cognize: Social Pact for Multiculturalism", and ratified the Convention concerning Indigenous and Tribal Peoples in Independent Countries (Convention No. 169) of the International Labour Organization.

C. Peru: Truth and Reconciliation Commission (2001-2003)

Background

43. The fall of the authoritarian regime led by Alberto Fujimori in 2000 made it possible to determine responsibility for two decades of abuses both under his Government and during a prolonged period of armed conflict. Beginning in 1980, the armed group known as "Shining Path" had been engaged in an armed conflict with the Government that had given rise to multiple scenes of violence, the emergence of various illegal armed organizations and massive human rights violations. In 2001, after democracy had been restored, the interim Government issued a decree establishing the Truth and Reconciliation Commission.

Mandate

44. The Commission was created to establish the process, facts and responsibilities for the terrorist violence and human rights violations committed between May 1980 and November 2000 by terrorist organizations or agents of the State, and to propose initiatives to reinforce peace and harmony.[42] Its objectives included analysing the political, social and cultural conditions and behaviour that contributed to the abuses; contributing to the administration of justice for the human rights crimes and violations, including determining the whereabouts and situation of the victims and identifying presumptive responsibilities; drafting proposals to provide victims and their families with reparations and dignity; recommending institutional, legal and educational reforms and guarantees to prevent the recurrence of such abuses; and establishing mechanisms for implementing its recommendations.[43] The Commission focused on assassinations and kidnappings, enforced disappearances, torture and other serious violations. Its mandate explicitly included investigating violations of the collective rights of the country's Andean and native peoples.

Methodology

45. The Commission comprised 12 Peruvian members (10 men and 2 women) appointed by its Chair, Salomón Lerner Febres, with the approval of the Council of Ministers. Only two of its members spoke Quechua, one of Peru's native languages.

46. The Commission opened five regional offices and sought the assistance of the International Red Cross and Red Crescent Movement, the Ombudsman's Office, the

[42] Supreme Decree No. 065-2001-PCM.

[43] Ibid., art. 2.

Human Rights Committee and other non-governmental organizations to search for people who had disappeared. It was the first Latin American commission to hold public hearings. Although the Commission did not have the power to subpoena witnesses, it recorded approximately 17,000 testimonies, including extensive interviews with key witnesses, which were incorporated into a comprehensive database.[44]

Final report

47. The Commission found socioeconomic gaps and serious ethnic and cultural inequalities that were reflected in the abuses. For example, 75 per cent of those who died spoke Quechua or another native language as their mother tongue,[45] and the tragedy was felt mainly by rural populations living in the Peruvian Andes and rainforest, who spoke Quechua or Asháninka, while the rest of the country remained unaffected. The actions carried out by "Shining Path" had "the potential for genocide" and all actors in the conflict had racist views about and feelings of superiority over indigenous peoples. Statistical estimates show that the death toll most likely reached 69,000. Public institutions, civil society, the media and the education system all contributed to the perpetuation of violence.

48. The Commission recommended that reparations should be granted, especially to peasant victims of indigenous ancestry, who were poor and marginalized; that efforts should be made to achieve national reconciliation, including recognition and acceptance of the multi-ethnic and multilingual composition of the country; and that criminal action should be taken against the perpetrators in order to combat impunity.

Follow-up

49. President Alejandro Toledo issued a formal apology on behalf of the State. Criminal action was taken against leaders of the illegal armed groups, former President Alberto Fujimori and his head of intelligence, Vladimiro Montesinos, and the members of a death squad that had operated under the orders of both men. A multi-sectoral high-level commission was established to follow up on the Commission's recommendations relating to collective reparations; bilingual versions of the report were produced to ensure that it could be read by both indigenous and non-indigenous people, and a national register of displaced persons was created.

Other truth-seeking mechanisms

50. Exhumations were conducted, revealing the existence of approximately 4,644 burial sites and the disappearance of around 8,304 individuals.[38]

51. The Commission transferred its files to the Ombudsman's Office; a historical documentation centre was opened; and an exhibition entitled "*Yuyanapaq*" was created, featuring hundreds of iconic photographs from the conflict, which had a profound impact on society.

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[44] Priscilla B. Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*, 2nd ed., Routledge (2010).

[45] According to the 1993 census.

D. Paraguay: Truth and Justice Commission (2004-2008)

Background

52. In 2003, Paraguay adopted Act No. 2225 establishing the Truth and Justice Commission to investigate crimes committed during the military regime led by General Stroessner. Under his reign, political freedom was restricted, indigenous peoples were assimilated and their language banned. In 1980, General Rodríguez ousted Stroessner and won the presidential election. Interest in creating a truth commission arose following the discovery of State intelligence files that exposed the role of the Paraguayan security forces in "Operation Condor",[46] through which the South American military dictatorships worked together to identify and capture opponents during the 1970s and 1980s.

Mandate

53. The Commission was mandated to investigate acts that constituted or could constitute human rights violations committed by State or parastatal agents between May 1954 and the promulgation of Act No. 2225. The Commission was instructed to focus on enforced disappearances, extrajudicial executions, torture, exile and other grave human rights violations; make recommendations on how to prevent the recurrence of such abuses; consolidate a democratic, social State governed by the rule of law; and foster a culture of peace, solidarity and harmony.

Work method

54. The Commission comprised nine members (eight men and one woman) and was chaired by Archbishop Monsignor Medina. Its findings were based on 2,050 testimonies[47] and 14,000 documents.[48] It also held eight public hearings, including one on the abuses suffered by indigenous peoples specifically.

Report

55. The Commission found that there had been approximately 19,862 arbitrary detentions, 18,772 cases of torture, 59 summary executions and 336 enforced disappearances. The repression was not limited to a specific group but was directed against people of diverse political, social and cultural backgrounds. Indigenous lands were systematically seized and unlawfully awarded to allies of the regime.[49] Indigenous people were among the most victimized and marginalized during the

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[46] A transnational military network for monitoring the torture, disappearance and execution of political opponents; the files discovered became known as "archives of terror".

[47] Testimonies were gathered through technical questionnaires requesting specific details about the victim, the violation committed, including the form, time and place, the consequences and the name of the perpetrator.

[48] Including documents from the Ombudsman's Office, the Judicial Documentation and Archiving Centre, the Committee of Churches for Emergency Aid, and the Antonio Guasch Centre for Paraguayan Studies, as well as files from the armed forces, the police, the military and the Ministry of Foreign Affairs.

[49] Report of the Truth and Justice Commission of Paraguay, Conclusions and recommendations, paras. 155 and 192.

dictatorship,[50] with the massacre of indigenous peoples and trafficking of indigenous children.

56. The Commission recommended continuing the investigation and search for missing persons; establishing a public information centre and a genetics database; including the report in public school curriculums; prosecuting the perpetrators; and designing a collective reparations programme for the peoples affected.[51] It further recommended investigating and analysing the possibility of environmental damage in indigenous regions; requesting the National Human Rights Secretariat and the National Institute for Indigenous Peoples to investigate massacres and other abuses of indigenous peoples and propose reparations; establishing collective memory measures; ensuring that indigenous peoples participate in proposing and implementing initiatives based on the requirement of free, prior and informed consent;[52] and producing texts and promoting radio programmes on the investigation in Spanish, Guaraní and other indigenous languages. It also strongly recommended that a report on unlawfully seized land should be submitted to the Counsel-General of the Republic and the Attorney-General of the State so that an investigation could be carried out and action brought for revocation of titles, reassessment and recovery of ancestral property and lands.[53] Lastly, it recommended that specialized training on indigenous rights should be provided for public officials and civil society organizations, including educational programmes on indigenous culture.[54]

Follow-up

57. The Truth, Justice and Reparations Section of the Ombudsman's Office, which was established in the aftermath of the Commission to implement measures, is initiating a process of dialogue to form a working group that would continue to investigate violations of the rights of indigenous peoples and discuss alternative forms of reparation.

Other truth-seeking mechanisms

58. The "archives of terror" and other files are kept at the Human Rights Defence and Documentation Centre. A virtual library was also created.

59. Bodies were exhumed as part of the Commission's work and the families of victims were provided with psychosocial care and support. An inter-agency commission was established for the study and creation of the genetics database, in order to facilitate identification of remains.[38]

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[50] Ibid., paras. 81 and 98.
[51] Ibid., para. 1(i).
[52] Ibid., paras. 6, 14, 21 and 56.
[53] Ibid., paras. 72-78.
[54] Ibid., paras. 113 and 115.

E. Canada: Truth and Reconciliation Commission (2009-present)

Background

60. The Truth and Reconciliation Commission of Canada[55] was established to look into abuse suffered by indigenous peoples through forced assimilation resulting from a mandatory education system of "residential schools" for indigenous children set up by the Federal Government in 1874. Under that system, indigenous children were forced to abandon their families in order to attend schools where they were prohibited from using their indigenous languages or cultural practices and frequently suffered sexual, physical and psychological abuse. The last such school was closed in 1996 and there are an estimated 80,000 survivors of that school system,[56] representing about 10 per cent of the indigenous people currently living in Canada.[57]

61. The Commission grew out of a lengthy process of disputes and court-mediated negotiations that resulted in an extensive programme of reparations and a request for a formal apology from religious and State institutions that had acted in complicity in those abuses. In 2006, following extensive negotiations between the Government, churches[58] and indigenous peoples, the Canadian Government approved the Indian Residential Schools Settlement Agreement, which cost an estimated 2 billion dollars. The Agreement called for the establishment of the Truth and Reconciliation Commission with a portion of the funds earmarked for reparation.

Mandate

62. The Commission was created to contribute to truth-seeking, healing and reconciliation through an individual and collective process with the commitment of all those affected.[59] The objectives of the Commission are to acknowledge the experiences in residential schools as well as their impacts and consequences; provide culturally appropriate, safe forums for former students, their families and their people to testify; facilitate truth-seeking and reconciliation at the community level and across Canada; promote awareness of and educate both Aboriginal and non-Aboriginal Canadians about the residential school system; identify sources and establish a historical register on the legacy of these institutions; prepare a report that includes recommendations for the Government of Canada with regard to the residential school system and submit it to the parties to the Agreement; and support the commemoration and honouring of former students.

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[55] It should be noted that there have been other truth-seeking initiatives on specific topics in Canada, such as the Royal Commission on Aboriginal Peoples, which recommended a public inquiry on the causes and consequences of the policies of assimilation, as well as the Missing Women Commission of Inquiry, which focused on missing women in downtown Vancouver.

[56] Truth and Reconciliation Commission of Canada, Interim Report.

[57] Rondha Claes and Deborah Clifton, Institutional Child Abuse: Needs and Expectations for Redress of Victims of Abuse at Native Residential Schools, Report to the Law Commission of Canada, Library and Archives Canada Electronic Collection of Monographs and Periodicals, http://epe.lac-bac.gc.ca/100/200/301/lcc-cdc/needs_expectations_redres-e/html/claes.html (Updated 12 December 2001), 2.

[58] Indian and Northern Affairs Canada, "List of Recognized Institutions", http://www.aadnc-aandc.gc.ca/eng/1100100015606/1100100015611 (Updated September 2010).

[59] First Nations, which were involved in residential schools, students, their families, communities, religious entities and the Canadian population.

Work method

63. The Commission consists of a Chair and two other members, all recognized for their personal integrity, professional career and affiliation with indigenous communities.[60] The commissioners — Justice Murray Sinclair (Chair), Ms. Marie Wilson and Mr. Wilton Littlechild — started their work in 2009.

64. The Commission is expected to have a secretariat and an executive director, as well as an Indian Residential School Survivor Committee, composed of representatives selected by indigenous organizations and survivors' groups. The Committee's role is to advise communities about participating in the proceedings of the Truth and Reconciliation Commission and in any other matter that the commissioners require.

65. Under its mandate, the Commission may make use of documents and testimonies (oral and electronic) and count on the voluntary participation of victims and witnesses. It does not, however, have the power to subpoena people who refuse to assist or participate in its proceedings.

Interim report

66. In 2011, the Commission issued its interim report showing its accomplishments, including the creation of regional offices and the establishment of a subcommission to take stock of experiences and provide support to the Inuit people, given their unique cultural characteristics and the specific impacts they suffered. The Commission staff comprises 75 persons, mostly of indigenous descent. The Commission has carried out a vast public education campaign, holding more than 200 conferences, commemorative events with testimonials, theatre, sports events, etc.

F. Maine: Child Welfare Truth and Reconciliation Commission (2012-present)

Background

67. In 2012, the chiefs of the five Wabanaki indigenous tribes of the state of Maine in the United States of America and the Governor of the state signed an agreement establishing the Wabanaki-State Child Welfare Truth and Reconciliation Commission, to look into the legacy of abuse under the Indian Adoption Project, through which hundreds of indigenous children were taken from their families and tribes in the 1950s and 1960s and placed in foster homes managed by the state. The Commission will examine the practice of forced assimilation of indigenous children and will recommend measures to remedy the impacts in their communities.

Mandate

68. The Commission was formed to uncover and acknowledge the truth, create opportunities to heal and learn from that truth, and collaborate to operate the best child welfare system possible for Wabanaki children. The Commission's

[60] Commissioners must be appointed from a group of candidates nominated by former students, indigenous organizations, churches and the Government; the Assembly of First Nations should be accessed on the final decision on the appointment of commissioners and at least one of the commissioners should be indigenous.

investigation shall focus on the period from passage of the Indian Child Welfare Act to the authorization of the mandate and should give voice to the Wabanaki people in order to understand and heal the wounds from the past; improve welfare practices for Wabanaki children; formulate recommendations and promote individual, relational, systemic and cultural reconciliation.

Work method

69. The Commission shall comprise five commissioners.[61] It will use convening groups to support communities and ensure that they participate in the process; conduct interviews and seek information; coordinate activities between the communities and the state of Maine; carry out dissemination activities; publish a final report and hold a closing ceremony. It shall also archive all documents, materials and recordings to ensure their preservation and accessibility to the public.[62]

III. Conclusions and recommendations

70. Truth commissions have been used extensively to investigate human rights violations suffered by indigenous peoples, although this has not always stemmed from a conscious effort by these institutions to achieve that goal.

71. If properly implemented, with strong guarantees of independence and honest leadership, the commissions may help to strengthen the rights of indigenous peoples, give concrete expression to the right to know the truth, recognize the dignity of indigenous peoples, and propose policies to prevent further violations. They could help to strengthen recognition of the sovereignty, identity and perspective of indigenous peoples and respect of their civil, political, economic, social and cultural rights, as well as the right to ancestral lands and natural resources.

72. As the cases analysed show, truth commissions have generally investigated and reported the existence of grave violations of human rights against indigenous peoples, recognizing their rich historical-cultural identity. Although some commissions did not emerge from an extensive consultation process, all have concluded by putting forward policies for consultation and inclusion of indigenous peoples. The commissions have also proposed measures to repair the harm inflicted on indigenous peoples and establish mechanisms to help them realize their human rights to the fullest. These truth-seeking mechanisms may also help to inform the non-indigenous society, which has largely ignored the needs and rights of indigenous peoples.

73. With the analysis of experiences and lessons learned in the practice of transitional justice as concerns the rights of indigenous peoples, we are able to make

[61] Presently, a group made up of representatives of the tribal Wabanaki government and the government of the state of Maine is collecting nominations for commissioners. Any citizen of the state of Maine may be nominated as a commissioner, provided he or she is recognized for his or her integrity, stature, empathy and respect and has demonstrated a commitment to the values of truth, reconciliation, equity and justice.

[62] Maine Wabanki-State Child Welfare Truth and Reconciliation Commission, established on 29 June 2012; available at http://maintribaltrc.org/assets/Documents/TRCmandate.pdf.

some recommendations that should to be taken into account when setting up a truth commission or other truth-seeking mechanisms involving indigenous peoples,[63] in order to respond adequately to their rights and perspectives. However, these recommendations are not a substitute for a proper analysis of each situation or for free decision-making by indigenous peoples themselves.

General recommendations

Consulting in good faith to obtain free, prior and informed consent

74. Broad and ongoing consultation with indigenous peoples is crucial to the success of a truth commission focusing on abuses suffered by those peoples.[64] Governments have a duty to consult in good faith and to obtain free, prior, and informed consent for any measure affecting indigenous peoples. This is premised on transparent objectives and an openness to continue the process of consultation until consent is obtained or not. This process requires time and commitment from the highest levels of political leadership in the country.

Respecting indigenous peoples' representative institutions

75. Indigenous communities, like any political community, may have multiple leaderships, representing different components within a society, sometimes in addition to traditional self-government institutions. Coordinating with multiple leaderships is a challenge for Governments thinking about setting up a truth commission, because it requires creativity to carry out the consultations in a broad and careful manner without fostering divisions.[65]

Considering the specific needs of indigenous women

76. A truth commission is a large-scale research project with thousands of people providing information, most of who will talk about events that had a profoundly negative impact on their lives. Commissions should adopt culturally appropriate methods to document the experiences of indigenous witnesses in a manner that they can understand, including respect for their language, customs and cultural practices.[66]

77. Truth commissions should employ indigenous and non-indigenous staff and give special consideration to the use and respect of indigenous languages in the case

[63] It is important to distinguish between commissions created with the specific goal of addressing the indigenous question, as was the case in Chile, Canada and Maine, and other initiatives that have addressed the indigenous question as part of a broader enterprise.

[64] This principle already enjoys consensus among transitional justice practitioners, but it is especially relevant for indigenous peoples.

[65] One of the most significant achievements of the Guatemalan truth commission was the mobilization of leadership to form new coalitions between indigenous organizations, well beyond the achievements of the commission itself.

[66] Participants are being asked to testify about something they are likely to have spent much of their lives trying to forget. By evoking these memories they risk suffering further traumatization, which is rarely pointed out in studies on transitional justice. Culturally appropriate mental health support is an important staffing consideration when planning operations, and efforts should be made to partner with government and civil society support networks. Where access and sustainability of care is constrained, participants should be aware of the options and limitations they face.

of an inquiry involving both indigenous and non-indigenous languages. Critical concepts in a non-indigenous legal framework may not translate accurately into indigenous languages, and vice versa. Indigenous and non-indigenous investigators should therefore cooperate in order to capture the meaning of testimonies, proposals and aspirations.

Establishment of truth commissions and other truth-seeking mechanisms

Considering whether to establish a truth commission

78. Truth commissions are usually created in the wake of violent conflict or authoritarian rule to address the legacy of grave violations. They intend to establish an authoritative narrative of facts, recognize the victims, and make policy recommendations to uphold the rights of victims and prevent repetition. In considering their establishment, Governments and citizens should take into consideration several factors, such as the existence of enough political will; the existence of adequate guarantees of security for participants in the inquiry; the likelihood of setting complementary roles; and the availability of adequate human and material resources.

79. In cases where indigenous populations have suffered atrocities, or it is suspected that they may have been specifically targeted, the following guidelines are proposed:

(a) The State should ensure that it has the capacity to receive first-hand information on abuses suffered, that indigenous peoples are free to document and report violations without risk of reprisal, and that there is adequate protection for information received on such crimes.

(b) If the conflict has affected the general population, but specific reports on violence against indigenous peoples have not been received, the State should make all efforts to receive information from indigenous peoples and to assess how general patterns of violence may have affected them.

(c) Where the subject of study of truth commissions or other truth-seeking mechanisms might include abuses that affect the rights of indigenous peoples, the authorities must ensure genuine consultation to obtain the free, prior and informed consent of indigenous peoples.

(d) Appropriate mechanisms for consultation may include assemblies, elders' groups, women's groups, youth associations, and other authorities. It is important to ensure that participants participate freely, receive all necessary information to ensure meaningful discussion, have sufficient time to engage in appropriate dialogue, and are free to express their ideas and proposals in the manner that is most culturally appropriate for indigenous peoples.

(e) Policymakers should identify what sources of information indigenous peoples consider most significant during this phase, including direct testimony, oral tradition and archives, and ensure that these sources are valued and protected.

Deciding the mandate of a truth commission

80. Truth commissions are created according to a legal mandate established through decrees or laws or negotiations between the parties, specifying their objectives, powers, focus of inquiry, composition and period of activity. The commissions should consider the following guidelines:

(a) The objectives of the commission should clearly include the stipulation that it will ensure that the rights of indigenous peoples are respected to the fullest extent possible, specifically identifying the rights that appear to have been violated during the period under examination.

(b) The mandate should state that established and developing international human rights law will guide the commission's activities, including specific instruments regarding the rights of indigenous peoples.[67]

(c) The members of the commission should include indigenous peoples at all levels, including as commissioners, monitors or staff, and their nomination and appointment should be conducted transparently and in consultation with indigenous peoples.

(d) The commission should secure the support of the appropriate government authorities at the national and local levels to facilitate genuine consultation, and should be allowed to enter into agreements with indigenous communities.

(e) The commission should be empowered to request and obtain effective cooperation from law enforcement authorities to ensure effective and culturally appropriate protection for indigenous communities offering information.

(f) The mandate should specify which abuses committed against indigenous communities fall under its jurisdiction. These abuses may include genocide, persecution, slavery, forced displacement, and other context-specific inhumane acts. Attention should be paid to violations of the rights of self-determination, access to ancestral lands and territories, and the practice of a specific culture and language.

(g) Notwithstanding the limited temporal scope of a truth commission, the mandate should specify that the commission should pay attention to the structural and historical causes of violations, including colonization and other forms of marginalization of indigenous peoples.

(h) Notwithstanding the limited territorial scope of the commission, when the indigenous peoples included in the inquiry are separated by international borders, the mandate should specify that the commission will be empowered to seek international cooperation.

(i) The mandate should recognize the legal and cultural value of indigenous practices o storytelling as valid sources to determine facts and determine responsibilities.

(j) The mandate should specify that all indigenous and non-indigenous persons who are the subject of negative findings shall have their rights to due process respected.

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[67] International Labour Organization Convention No. 169 and the United Nations Declaration of the Rights of Indigenous Peoples.

(k) The national authorities responsible for approving the mandates of commissions should provide enough time for meaningful consultation before approving the mandate. If external circumstances prevent full consultation with indigenous populations, governments should consider suspending the application of the mandate to such populations until consultation is carried out.

(l) The act of adoption of the mandate should involve indigenous peoples and recognize their traditions to witness, solemnize, and legitimize the mandate.

Establishment of commissions

81. Truth commissions are usually established when the commissioners are appointed. The initial activities of a commission include interpreting its mandate, determining a methodology for the inquiry, planning and allocating resources, establishing offices, and hiring staff. When a truth commission is mandated to investigate abuses against indigenous peoples, it should consider the following guidelines:

(a) Adequate consultation should be carried out to nominate, vet and appoint commissioners.

(b) The commission should include indigenous commissioners and non-indigenous commissioners should be persons who are committed to the rights of indigenous peoples.

(c) In appointing its staff, the commission should ensure that indigenous persons are represented, particularly in units that will be responsible for gathering information and conducting outreach campaigns. All staff of the commission should receive appropriate training to ensure knowledge of and respect for indigenous languages and cultures.

(d) The commission's offices should be located in a manner that maximizes access by indigenous participants. Mobile teams should be created to ensure that deponents in remote areas have an opportunity to participate in the process.

(e) In determining the method of inquiry to be used, the commission should include forms of transmitting knowledge and offering testimony common to indigenous cultures, ensuring that participants can use the language that they find appropriate.

Operations of truth commissions

82. Commissions established to investigate violations suffered by indigenous peoples should consider the following guidelines:

(a) Publish and disseminate a declaration of principles that will guide their work, including specific guarantees to ensure respect for indigenous peoples and maximize their participation in the process.

(b) Secure the advice of indigenous organizations, through bodies such as committees or organizations of survivors and elders; and contact international bodies that promote and protect indigenous rights.[68]

[68] In particular, the United Nations Permanent Forum on Indigenous Issues, the Expert Mechanism on the Rights of Indigenous Peoples, the United Nations Special Rapporteur on the rights of indigenous peoples, and relevant regional bodies.

(c) Conduct outreach to indigenous communities with accurate information, responding to any specific questions from indigenous populations; and build alliances with indigenous organizations to assist with outreach campaigns and depositions.

(d) Outreach to non-indigenous populations should have a strong educational component to explain the importance of recognizing the violations committed against indigenous peoples and encourage and facilitate cooperation of different indigenous and non-indigenous communities, in order to overcome the legacies of conflict.

(e) The commission must take effective measures to ensure that depositions and evidence-gathering are culturally appropriate to indigenous communities and persons and in their mother tongue. The commission must balance diverse methods of testimony, both individual and collective. In the case of collective deposition, the commission should ensure that the voices of indigenous women and children are heard.

(f) In cases concerning the search for missing and disappeared persons, the commission should observe the rituals that the community considers most appropriate in the different phases of exhumation, identification, and devolution to the families,[69] and provide psychosocial assistance and support to families in keeping with indigenous traditions.

(g) Public hearings of the commission involving witness testimony should be conducted in accordance with indigenous customs for receiving, listening to and comforting witnesses. Participation in public hearings must be subject to free, prior and informed consent.

(h) Standards of evidence by commissioners should value and respect indigenous forms of testimony that may be different from archives or written records, in particular indigenous oral tradition and performance.

Reporting by truth commissions

83. Truth commissions should consider the following proposed guidelines:

(a) The structure of the report should be meaningful and relevant to indigenous communities, respond to their questions and respect their narrative techniques. The indigenous contribution to the findings and recommendations of the commission should be recognized and guaranteed.

(b) The report's findings should recognize the dignity of indigenous peoples and clearly state that the abuses committed against them are ethically and legally unacceptable. The commission should clearly detail fact, context, political responsibility and, when appropriate, presumptive responsibilities for violations.

(c) The report should include recommendations on transformative action, promoting the full enjoyment of indigenous rights, particularly self-determination, access to land and territory, and cultural rights.

[69] It should be noted that exhumation practices violate the traditions and perspective of some indigenous communities, including the Asháninka people in Peru.

(d) The report format should ensure maximum dissemination among indigenous populations, including video and audiovisual versions; indigenous language versions and educational summaries.

(e) The presentation of the final report to the highest authorities in the State should include solemn ceremonies respecting indigenous customs and symbolism.

Following up on reports

84. Truth commissions should consider the following proposed guidelines:

(a) The legal mandate of the commission or its report should call for the establishment of a successor institution, which should engage in direct dialogue with the Government in order to implement the commission's recommendations. The institution should be established with the prior, free and informed consent of indigenous peoples.

(b) Preservation of the commission's records should ensure guaranteed access and use by indigenous communities and persons, while respecting the guarantees of privacy and due process afforded to those documents in the existing legal framework.

(c) Recommendations that may affect the rights of indigenous peoples should be implemented after consulting them and obtaining their free, prior and informed consent.